

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO 100 OF 2016
(ARISING FROM CIVIL SUIT NO. 58 OF 2011)**

**MUDHWIGA ALI APPELLANT
VERSUS
BEATRICE BBEMBA RESPONDENT.**

JUDGMENT

BEFORE HONOURABLE JUSTICE EVA K. LUSWATA

A Introduction

- 1] The appellant brought this appeal against the judgment and decision of Her Worship Angura Sheila Fionah delivered on 15/7/16. In her judgment, the Learned Magistrate adopted the following facts as representative of the appellant's/plaintiff's claim:-

- 2] That the land situated at Budwhiga Zone LCI, Kasambira Village in Bugulumbya Sub County, Kamuli District (hereinafter referred to as the suit land) was at some point, the property of the late Nguma Musubo, the appellant's grandmother. That upon Musubo's death, the suit land was inherited by her daughter Edinansi Lakeri Mariam Kasubo the appellant's mother who also died in 2009. The appellant was born on the same land and inherited it upon the demise of Kasubo. He retained its possession until when he was admitted in the Kamuli Mission Hospital in 2010.

- 3] In defence to the suit, the respondent/defendant denied the fact that the suit land was ever owned by the appellant's family or inherited by him. That to the contrary, the suit land belonged to her late husband's family and was finally inherited by her son Oliver Raymond Siira Bbemba, and she was in possession thereof on his behalf.

B. Grounds of appeal

- 4] In her decision, the Learned Magistrate believed the testimonies of the respondent and her witnesses and dismissed the appellant's claim. Being dissatisfied with that decision, the appellant filed this appeal on the following grounds.
- 5] **1) The trial court erred in law and fact when it failed to properly evaluate the evidence on record in the matter and by so doing, arrived at a wrong decision, thus occasioning a miscarriage of justice.**
- 2) The trial court erred in law and fact when it mixed up the evidence presented before it and also introduced mysterious witnesses onto the record, and by so doing occasioned a miscarriage of justice.**
- 3) The trial court erred in law and fact when it delivered a decision without giving a reason for its decision, since the judgment did not give details and analysis, and by so doing, occasioned a miscarriage of justice.**
- 4) The trial magistrate erred in law and fact when she based her trial and findings on bias in the entirety of the judgment, having failed to address her mind to the land actually in issue, and thus, occasioned a miscarriage of justice.**
- 6] The appellant chose to represent himself at the trial. After due guidance from court, he presented oral submissions, which covered the four grounds of appeal, fairly well. Counsel Onesmus Tuyiringire who represented the respondent, presented oral submissions as well.

C. The Duty of the first Appellate court.

- 7] The duty of the first Appellate Court has been reiterated in numerous cases. It is to re-evaluate and re-appraise the evidence on record and come to its own conclusion. In the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, Order JSC held that;

“The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as to evidence by oral testimony, with the exception of the manner and demeanor of witnesses, where it must be guided by the impression made on the trial judge.”

8] I will closely take note of the principal expoused in the above decision as I write this judgment.

D. **Application to adduce evidence on appeal**

9] During the hearing of 28/3/2018, the appellant attempted to adduce a copy of a document, which he claimed he was prevented from adducing at the trial because of a change of the Magistrate presiding over the matter. He explained that it was a document prepared by the clan of Bayisemusubo explaining how Mutekanga bought the suit land He requested court to consider it as good evidence in support of his claim to the suit land. Upon directions of court, he filed an original copy after those proceedings.

10] Counsel Tuyiringire strongly objected. He denied the fact that there was any attempt to adduce the document and/or a denial by court for the appellant to adduce it. Further that the appellant who was not its author could not adduce it and no reasons were advanced to explain why PW3 Mutekanga Sanoni Ndimukika its author, was never led to adduce it during his testimony at the trial. He argued that its introduction at the appeal stage was only an afterthought and prejudicial to the respondent, since its author was never subjected to cross examination.

11] I tentatively allowed the document onto the appeal record, with an undertaking that I would make my decision on whether or not to allow it as a new document adduced on appeal.

12] Under Section 80(1) (d) CPA, an appellate court has powers to take additional evidence, or require such evidence to be taken. Under Section 80(2) CPA, in so doing, the appellate court shall have similar powers and duties as imposed on courts of original jurisdiction.

13] Further under O. 43 rr (1) (a) and (b) CPR, additional evidence on appeal may be admitted where it is shown that the trial court declined to admit it, it is necessary on appeal to enable

the appeal court pronounce judgment, or for any other sufficient cause. It was the decision of the Supreme Court in **Dharamsy Morarfi & Sons Vs. S N Karia SCCA No. 27/96**, that although it is the discretion of the appellate court to admit additional evidence on appeal, there must be sufficient reasons to justify reception of such evidence.

- 14] The document sought to be adduced by the appellant was allegedly authored by PW3 Ndimukika Mutekanga Sanani on 27/9/16. PW3 gave his evidence on 11/2/13 well before the document was written. That would discredit the appellant's argument that the new Magistrate in the case declined or neglected to admit it.
- 15] I note that the document was simply a narration or opinion of Mutekanga of what he believed to be the true history and ownership of the suit land. Much of what is contained in the document is what he put forward in his testimony. There would be no new or useful evidence that would assist this court in her judgment. The agreement referred to (between Mutekanga Kintu Daudi and Mukula Sinani in 1917) is not even attached to document. I accordingly decline to allow the appellant adduce that document on appeal.

I will now turn my attention to the results of the appeal.

16] **Grounds of appeal**

17] I will resolve ground 1, and 4 concurrently.

18] **Grounds one and four**

19] **The trial court erred in law and fact when it failed to properly evaluate the evidence on record in the matter and by so doing, arrived at wrong decision, thus occasioning a miscarriage of justice.**

20] **The trial magistrate erred in law and fact when she based her trial and findings on the bias in the entirety of the judgment, having failed to address her mind to the land actually in issue, and thus, occasioned a miscarriage of justice.**

- 21] The appellant argued that the Magistrate failed to evaluate the evidence properly and acted with bias. That she considered a son of the wrong lineage to take the suit land and sided with his mother, as a woman, and thereby considered capable of owning land. Also that the close relationship exhibited by the Magistrate and the respondent's counsel (e.g. arriving in the same car at the locus) was strong behavior of bias. Respondent's counsel disagreed. He argued that the Magistrate who wrote the judgment took up the matter for the first time just before the locus visit. He did not travel with the Magistrate to the locus, and her involvement in the suit was too short for her to have known the parties well enough, to form a preference or bias of one against the other.
- 22] **PW1** stated that the suit land belonged to his mother the late Mariam Edinansi Lakeri Kasubo who died in 2009 and whom he succeeded and thus inherited the suit land. That his mother's brother was the father to the defendant's husband, the late Sosi Bbemba. He admitted he had no home on the suit land, but was born there in 1962. **PW2** Mawerere Juma supported that evidence. He narrated that the respondent is the widow to his late grandson Sosi Bbemba. That the suit land belonged to the appellant who had inherited it from his mother Kasubo the latter who had also acquired it from her late father Kibina in or around 1943. Kasubo then gave it to the plaintiff in 1975. He explained that Sosi Bbemba and Kasubo shared a father and each owned a distinct portion of the suit land with a boundary in between. That the respondent had now overstepped into the appellant's portion.
- 23] On the other hand, **PW3**, Ndimukika Mutekanga Sanoni stated that following the death of his mother, the appellant received the land from his grandmother Nguna Namusubo, at time he could not recall. That in 2010, the appellant reported to him that the probation officer had given out the suit land to the respondent. The dispute was resolved by each party being requested to retain possession of their respective portion, which ended the matter.
- 24] On the other hand, the respondent testified that she inherited the suit land from her husband, the late Sosi Bbemba who also inherited it from his late father Sakeri Bbemba

before their marriage in 1958, well before the appellant was born. That she was in continuous occupation of the suit land for more than 20 years before filing of the suit. That for all that time, she had never seen the appellant or his mother on the suit land. That Sosi Bbemba died in 1995 and was buried on the suit land and the conflict began in May 2011 when the appellant ploughed down her crops, a matter that was reported to the LCs. That the appellant shunned LC summons, but agreed to submit to a mediation by the probation officer, at which meeting he conceded that his claims were erroneous. That he was later to turn around, threatened violence against her, resulting into his arrest and prosecution.

- 25] On the other hand, **DW2** Nabirye Jane stated that he was the daughter of the late Asakeri Bbemba, the original owner of the suit land. That upon Asakeri Bemba's death in 1950, the land was passed on to his widow and children, and ultimately, was inherited by Bbemba Sosi his son in 1950 and the respondent as his widow had been in occupation since then. That Bemba's will was read indicating that the land was left to the widow and her child Lamondi Sira. That the dispute started in 2011. When the appellant claimed that as a grandchild, he too was entitled to a share of the suit land
- 26] On his part, **DW3** Mutibwa Bumali stated that he had been area chairperson since 1990 and had stayed in Budwiga village for 55 years on property about 1 km away from the suit land. He was aware that the respondent as the widow of Sosi Bbemba and daughter in law of Sakeri Mugweri Kiwa, became the custodian of the suit land when Sosi Bbemba died in 1995. He was also aware that one Bbemba Beatrice rented out the suit land to the appellant's mother (who was also Sakeri Kiwa's half-sister).
- 27] At the locus visit, the Learned Magistrate noted that the suit land as shown to her by the appellant contained growing sugar cane and seasonal crops planted by the respondent. There was in addition an old church constructed by the respondent, with the respondent's homestead right in the middle of it. She also noted the presence of graves of the respondent's late husband, father in law and children buried between the period 1990 - 2013. As stated by the appellant, his homestead was not within the disputed suit land.

- 28] In my view, the Learned Magistrate relied entirely on the testimonies of the witnesses to make an assessment that the respondent's version bore more truth. Her testimony that she had lived on the land since her marriage in 1958, was testimony of long and uninterrupted occupation. That evidence and what was stated by her witnesses was well supported by what was found at the locus. It was the respondent in occupation of the suit land, and the graves of her late husband, father in law and some of their children was evident on ground. It was well explained by DW1 and DW3 how the appellant's family came to use the suit land. It was further explained by DW2, that the dispute erupted in 2011 when the appellant as a grandson felt that he was entitled to a share in the suit land. At some point, one Beatrice Bemba rented it out to Kasubo the appellant's mother. This would not give him rights that would superceed those of the respondent and her family.
- 29] PW2 appeared not to know the history of the suit land well and his testimony that the appellant and respondent's family shared portions of the suit land was never advanced by the appellant. Again, the appellant never adduced any evidence to show that he agreed to retain a portion of the suit land as advanced by PW3. It was the assertion of the appellant that his late mother once owned and used the suit land as her banana plantation. He was specific in cross-examination that the land was never demarcated.
- 30] If there was any doubt in the Magistrate's opinion, EXP. DI would dispel any claims to the suit land by the appellant. It was a document authored on 16/8/2011 by the appellant himself in which he agreed to hand over the land of the late Sosi Bemba (most likely to the respondent). It was made in the presence of an LC official, probation officer and clan members. That document would contradict the testimony of PW3 that the dispute was resolved by the probation officer asking each party to keep a portion of the suit land.
- 31] On the other hand, Exp. DI vindicated the evidence of the respondent and her witness that the dispute erupted in 2011 when the appellant forcefully took over the suit land. The matter was reported to the probation officer who mediated a settlement in the presence of local authorities and elders. The appellant agreed to hand over the suit land and pledged not to interfere with it again. An undertaking he was later to abuse. DW2 and DW3 were

both present during that meeting, and DW3 signed and sealed it as Chairperson of Budwiga LCI. The respondent did not contest that document at all, an indication of its authenticity and truth of the facts as related by the respondent.

- 32] It is apparent on the record that the Magistrate gave each party equal opportunity to present their evidence and then properly addressed herself not only to the evidence in court, but also to what she found on the ground. Her decision was thus the result of a fair and proper evaluation of that evidence, and I find no fault with it.

Grounds 1 and 4 accordingly fail.

Ground 3

The trial court erred in law and fact when it delivered a decision without giving a reason for its decision, since the judgment did not give details and analysis, and by so doing, occasioned a miscarriage of justice.

- 33] **Order 21 rule 4 of the Civil Procedure Rules** provides that “ Judgments in defended suits shall contain concessive statements of the case, the points of determination, the decision on the case and reason for the decision.”

- 34] In her judgment, the Learned Magistrate clearly gave the facts/background of the case, issues for determination and then, evaluated the evidence of both the appellant and respondent. She then made the conclusion that the respondent’s evidence that she acquired the suit land by way of inheritance from the late Sosi Bbemba was confirmed by **DW2** and **DW3**. Having evaluated, analyzed and compared that evidence with what she found at the locus in quo, she found reason to believe the respondent. She gave reasons for that decision. Again, I would find no fault in her conclusions or how she arrived at them.

- 35] Ground three accordingly fails as well.

36] **Ground Two:**

The trial court erred in law and fact when it mixed up the evidence presented before it and also introduced mysterious witnesses onto the record, and by so doing occasioned a miscarriage of justice.

37] At the trial, the respondent presented three witnesses. Herself, DW2 Nabirye Jane, and PW3 Mutibwa Bumali who was noted on the list of witnesses as Mawerere Bumali. His actual name was stated to be Mutibwa Bumali. It was confirmed that he was the one and same person before Court granted leave for him to testify. There was no contest against the Magistrate's decision at the trial, and thus that issue should not have been a matter of appeal. Thus I find that there was no witness referred to in the judgment who was not on record of the lower court and as such, no mysterious witnesses were introduced onto the record. There is also no evidence that the Learned Magistrate mixed up evidence, at least, no express submission pointed to that fact.

38] Ground two accordingly fails.

39] In conclusion, I find no merit in the appeal which is dismissed with costs to the respondent.

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EVA K. LUSWATA

JUDGE

DATED 14/5/2019